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December 10, 2003

Ms. Cathy Carpino
Federal Communications Commission
Wireline Competition Bureau
Competition Policy Division
445 12th Street, SW, Suite 5-C327
Washington, DC 20554

Re: WC Docket No. 03- 45

Dear Ms. Carpino:

Vonage Holdings Corporation ("Vonage") respectfully submits the following *ex parte* comments regarding the pulver.com Petition for Declaratory Ruling in the above-referenced docket.

As you know, Vonage has recently filed a Petition for Declaratory Ruling (in WC Docket No. 03-211) concerning the regulatory treatment of Vonage's Voice over Internet Protocol ("VoIP") service. Vonage's service is different in a number of material respects from pulver.com's Free World Dialup ("FWD") system, which is the subject of this petition. As the Commission has noted, the application of statutory definitions to particular services needs to be based upon a factual record focused on those individual service offerings. *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 90 (1998) ("*Universal Service Report*"). The issues in Vonage's and pulver.com's respective Petitions, therefore, must be resolved separately based upon the differing characteristics of the two offerings.

There is at least one respect, however, in which the Vonage and FWD offerings are quite similar. Both services are accessible to users over the "public Internet"; that is, customers can access either Vonage or FWD from any broadband Internet connection, regardless of the entity from which they obtain their Internet access. Neither Vonage nor (to our knowledge) FWD is affiliated with any Internet access provider, and they do not restrict usage of their service to particular Internet access connections. Thus, these offerings are distinctly different from services that are accessed by dialing-in from stations on the Public Switched Telephone Network.

In particular, because these services can be accessed over the Internet and are not tied to a specific form or provider of access, they are inherently portable. Customers can use either Vonage's service or FWD from any location at which they can obtain high-speed Internet access.

For example, these services can be used in many hotel rooms,¹ and at Wi-Fi hot spots found (for example) at coffee shops, delicatessens, public parks, and even the Commission's own headquarters.² Further, because of the nature of Internet routing and addressing, it may be difficult or impossible for the service provider to determine where its user is physically located at any given time. There is no uniform method of matching Internet addresses to physical locations. Indeed, as newer "WiMax" wireless access technologies are expected to provide much wider geographic coverage than current Wi-Fi frequencies, even knowing where a customer accesses a wireless network may not be enough to identify the user's actual location.

Because Internet access is not tied to a physical location and services provided over the public Internet are therefore portable, Vonage respectfully submits that, regardless of what Federal laws and regulations may apply to a particular service, the Commission should preempt the application of *State* common carrier regulation to any service offered in this manner.

It is clear that this Commission has power to preempt State actions that would affect interstate communications: "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to *interstate* communications service are to be governed solely by federal law and ... the states are precluded from acting in this area."³ Further, the Commission has not hesitated to preempt State regulation where, as a practical matter, it is impossible to separate a jurisdictionally mixed service into interstate and intrastate components.⁴ For example, the Commission has asserted jurisdiction over dedicated private lines carrying jurisdictionally mixed traffic (except where the interstate use is *de minimis*), because of the practical impossibility of measuring and billing separately for the portion of the line carrying intrastate traffic.⁵ Similarly, when the Commission granted GTE's request to tariff the DSL Internet transport service sold to ISPs such as AOL, the Commission found that Internet access is interstate tele-

¹ See, e.g., John C. Dvorak, "Free Phone Calls," *PC Magazine* vol. 22, no. 14 at 57 (August 19, 2003), available at <http://www.pcmag.com/article2/0,4149,1204918,00.asp> (visited Dec. 9, 2003).

² FCC News Release, "FCC Goes WiFi," released Aug. 4, 2003.

³ *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir.1968) (emphasis added). See also *National Ass'n of Regulatory Util. Comm'rs v. FCC*, *supra* (affirming rules precluding states from regulating WATS service because "interstate communications ... are placed explicitly within the sphere of federal jurisdiction by the plain language of the Communications Act").

⁴ See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd. 22983, ¶ 107 (2000) ("[b]ecause fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority"); *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, 10 FCC Rcd. 11700, ¶¶ 85-86 (1995) (California default line-blocking policy was preempted because it would preclude transmission of Caller ID numbers on interstate calls, and effect of the policy was inseverable).

⁵ *MTS and WATS Market Structure*, 4 FCC Rcd. 5660, 5660-61, ¶¶ 6-9 & n.7 (1989); see also *Petition of New York Telephone Company*, 5 FCC Rcd. 1080 (1990).

communications.⁶ The Commission acknowledged that some of the transmissions passing over an Internet access line may be intrastate in nature, but that the interstate component was not *de minimis*.⁷

The same inseverability doctrine justifies preemption here. Although both Vonage's and pulver.com's systems may be used in some cases to complete jurisdictionally intrastate transmissions, neither company has any reliable means of determining *which* transmissions are intrastate and which are interstate, since they cannot determine where their users are located. It would therefore be impossible to record and bill separately for interstate and intrastate usage; to measure revenues based upon jurisdiction (or to compute taxes, fees, or regulatory assessments based on jurisdictional revenue); or to comply with any other regulatory requirements that apply based upon the jurisdiction of traffic. For example, if a State could require Vonage or pulver.com to file tariffs, the company would have no way of determining which services were subject to the terms of those tariffs, and which were subject to the terms of negotiated contracts. This would conflict with the Commission's detariffing policy for interexchange services.⁸

Accordingly, Vonage submits that it is well within the Commission's authority, and consistent with its precedent, to preempt State common carrier regulation⁹ of voice services offered over the public Internet as described above. This preemption rationale applies regardless of whether a particular voice service is treated as an information service or a telecommunications service for purposes of Federal regulation.

Very truly yours,

/electronically signed/

William B. Wilhelm
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Attorneys for Vonage Holdings Corporation

⁶ See *GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, 13 FCC Rcd. 22466 (1998) ("GTE DSL Order").

⁷ *GTE DSL Order*, ¶¶ 22, 25.

⁸ *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996), Report and Order, 11 FCC Rcd 9564 (1996); Second Report and Order, 11 FCC Rcd 20,730 (1996), Order on Reconsideration, 12 FCC Rcd 15,014 (1997); Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999); Order, DA-002586 (Chief, CCB), rel. Nov. 17, 2000.

⁹ By "common carrier regulation," we mean not only regulation of entry and rates, but also any regulation of terms and conditions of intrastate service that would require treating such services differently than interstate services. We do not intend to suggest, however, that Vonage or similar companies would be exempt from State laws of general applicability, such as consumer protection and civil rights laws, to the extent they operate within a particular State's jurisdiction.